SUPREME COURT, U. S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1084

S. PERLSTEIN & SONS FIRE COMPANY, INC.,
Petitioner

v.

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, S. PELICIONE & SONS FISH COMPANY, INC., prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioner seeks review of the decision rendered in S. PELICIONE & SONS FISH COMPANY, INC. v. CITIZENS CASUALTY COMPANY OF NEW YORK, 430 F.2d 136 (5th Cir., 1970). (*Infra*, Appendix A.)

The decision of the United States District Court for the Middle District of Florida is not reported. Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are appended hereto. (*Infra*, Appendix B).

JURISDICTION

The decision sought to be reviewed herein was entered July 23, 1970. (Appendix A). A timely petition for rehearing was denied by Order dated September 18, 1970. (*Infra*, Appendix C). This petition for certiorari was filed less than 90 days from the date of the denial of rehearing. No extensions of time have been granted within which to petition for writ of certiorari. The United States Court of Appeals for the Fifth Circuit has granted a stay of its mandate for a period of ninety days for the filing of this petition for writ of certiorari. (*Infra*, Appendix D).

Jurisdiction is based upon Title 28, USC, §1254 (1); c.646, 62 Stat. 928.

QUESTIONS PRESENTED

1. Where a standard time hull marine insurance policy assures against "assailing thieves . . . and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein" and the property which is the subject of such a policy is separately described as "The wood diesel shrimper called 'MISS SONDRA LEIGH', her hull, tackle, apparel, engines, boilers, machinery, appurtenances, equipment, stores, boats and furniture . . .", does such insuring agreement provide coverage against an assailing theft of the entire vessel and not solely "property on board"?

2. Was the petitioner deprived of due process in that the Court of Appeals refused to consider certain alternate bases of liability under a marine insurance policy and reversed and rendered the cause upon the erroneous statement that such alternate contentions had not been asserted in the District Court when the case was tried on briefs in the District Court and the record affirmatively shows in such briefs that petitioner had asserted all such alternate contentions and such alternate contentions had not been ruled upon or reached by the District Court because its finding of liability under the assailing theft peril resolved the question of liability?

CONSTITUTION PROVISION INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

This litigation was commenced by the plaintiff, S. Felicione & Sons Fish Company, Inc., a Florida corporation, to recover on a policy of insurance sold and issued to it by the defendant, Citizens Casualty Company of New York, a New York corporation. The policy of insurance provided hull and machinery coverage to the wood diesel shrimper MISS SONDRA LEIGH which was struck and sunk by the steel hulled shrimper ESTO FLEET in the Gulf of Mexico upon or near the Campeche Flats, on or about November 19, 1967. The plaintiff sought to recover the agreed value of the MISS SONDRA LEIGH of $34,000, as specified in the policy of insurance issued by the defendant and forming the basis of this litigation.

District Court Jurisdiction

This action was commenced by the filing of a complaint in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, in and for Hillsborough County, on December 29, 1967. The defendant filed its answer and affirmative defenses on or about January 31, 1968. On or about May 15, 1968, plaintiff filed its petition for removal in the United States District Court for the Middle District of Florida. (R. 1)[1] On or about May 16, 1968, plaintiff filed a removal bond in the sum of $500. Jurisdiction in the District Court was predicated on Title 28 USC, § 1441(a); c.646, 62 Stat. 937, and Title 28 USC, § 1332(a) and (c); c.646, 62 Stat. 930 (amended).

The Loss of the MISS SONDRA LEIGH to the Insured

The facts surrounding the demise and destruction of the MISS SONDRA LEIGH are uncontroverted and may be briefly summarized.

The shrimp trawler MISS SONDRA LEIGH was fishing the Campeche Bay, from November 13 through November 18, 1967. She was under the command of Captain Lee Tindall and carried as a crew a rig man, Louis Duhon, and a "header," an unidentified Mexican National. (R. 2) (Duhon Deposition, p. 35-43). At approximately 3:30 p.m., on November 18, 1967, she

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[1] References are to those documents comprising the parts of the original record on appeal which the petitioner has requested the Court of Appeals to certify to this Court. Additionally, where the document referred to is the deposition of Louis Duhon or Oscar Grisham, reference will be made to the appropriate page number of the deposition as contained in the printed appendix used in the Court of Appeals which has been certified to this Court. (R. 2)

dropped anchor in international waters, in order to discharge her catch into the service vessel JUNE which would then take the catch to port. (R. 2) (Duhon Deposition, p. 41). At the same time, the ESTO FLEET, a 72-foot steel hull vessel under the command of Captain Frank Paprocki, was anchored about 150 yards to the starboard of the MISS SONDRA LEIGH. After the MISS SONDRA LEIGH had discharged her shrimp into the trawler JUNE, the ESTO FLEET came alongside the MISS SONDRA LEIGH and made up to her. Captain Paprocki emerged from the wheel house of the ESTO FLEET, apparently drunk, with a bottle of whiskey in one hand and a gun in the other. He began shooting in the air and the water. Some of the shots hit the galley and the wheelhouse of the MISS SONDRA LEIGH (R. 2) (Duhon Deposition, p. 43). Captain Paprocki and Captain Tindall engaged in an argument when Captain Tindall requested that Captain Paprocki stop shooting the gun. (R. 2) (Duhon Deposition, p. 43-44).

Captain Paprocki asked Captain Tindall and Duhon to drink with him. They refused. Captain Paprocki then returned to the ESTO FLEET. Captain Paprocki, after requested by Captain Tindall, refused to release the lines that held the ESTO FLEET to the MISS SONDRA LEIGH. The MISS SONDRA LEIGH broke ground with the ESTO FLEET in tow. Duhon went below to prepare the ice bed for the shrimp. While below he heard two shots above and two shots by the hatchway. (R. 2) (Duhon Deposition, p. 43-45).

When Duhon came topside he saw that both Captain Tindall and the Mexican National were dead. Duhon grabbed a life jacket from the sleeping quarters. Paprocki fired twice as Duhon jumped overboard but missed

him. After twelve hours Duhon was picked up by a Mexican "coyote," a small fishing boat. (R. 2) (Duhon Deposition, p. 45-47).

On the morning of November 19, 1967, the day subsequent to the foregoing events, Captain Oscar Grisham of the TOBY JEAN saw the MISS SONDRA LEIGH made up to the port side of the ESTO FLEET. The ESTO FLEET was towing the MISS SONDRA LEIGH towards open sea. At the time Captain Grisham saw the MISS SONDRA LEIGH she was upright and "sunk down to her deck." As Grisham watched, Captain Paprocki proceeded to overturn the MISS SONDRA LEIGH by "swinging to and fro" on a tow line and then ram her three times while capsized, once on the starboard and twice on the port. (R. 2) (Grisham Deposition, p. 24-25).

Thereafter the MISS SONDRA LEIGH was recovered and towed to just offshore of Mexico, on November 20, 1967, at which time Captain Tindall's body was discovered chained inside the fish hold. The body of the Mexican National was discovered chained to a fuel tank.

The Policy of Insurance

The policy of insurance executed by the agent of the defendant, Citizens Casualty Company of New York, at Jacksonville, Florida, and delivered to the plaintiff, S. Felicione & Sons Fish Company, Inc., at Tampa, Florida, plainly contained the following standard perils clause (R. 1) to-wit:

> "Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jetisons, barratry of

the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein."

The property insured against the foregoing perils was described in the following language (R. 1):

"The wood diesel shrimper called MISS SONDRA LEIGH her hull, tackle, apparel, engines, boilers, machinery, appurtenances, equipment, stores, boats and furniture."

The policy contained the following F. C. and S. warranty (R. 1):

"Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy."

District Court Findings

After reciting the facts, the District Court entered the following conclusions of law:

"1. When Captain Paprocki lashed down the bodies of the dead seamen to the MISS SONDRA LEIGH and towed her seaward, casting her away by towing her so as to sink her, and then exorting [sic] a final flourish by ramming her, he acted with force against the insured property with the intention of permanently depriving the owner of the property so as to fall within that provision of the policy insuring against loss from 'assailing thieves.' Captain Paprocki was an assailing thief.

"2. The Court holds that the defense of piracy has not been established. Captain Paprocki was not a pirate, nor did his actions fall within the ordinary definition of piracy. The actions of Captain Paprocki were more in the nature of irrational murder

and an attempt to destroy the evidence than that of 'robbery, murder, or forcible depredation on the high seas, without lawful authority, *in the spirit and intention of universal hostility*. Rene de Kerchove, International Maritime Dictionary (1960 Edition).

"3. Plaintiff is entitled to judgment against the Defendant in the amount of $34,000, together with interest from December 27, 1967, and his costs." (Appendix B, p. 6).

Procedural Facts

In the District Court this cause was removed from the jury calendar and submitted to the District Court on brief. The trial briefs reveal that the petitioner, S. Feliciane & Sons, contended that Captain Paprocki was an "assailing thief," and if not technically an "assailing thief," the peril to which the vessel was subjected was a "like peril" under the policy to that of an "assailing thief" and therefore was covered. The petitioner's trial brief also reveals that it raised in the District Court the alternate contention that the MISS SONDRA LEIGH was lost due to collision with the ESTO FLEET, a covered risk as a peril of the "waters named herein." (R. 3).

The trial brief of the defendant, Citizens Casualty Company, reveals that it contended, contrary to its contention in the Court of Appeals, that the "assailing thieves" peril referred to a theft by force or violence of a vessel in port and that the same event at sea would be piracy, an excluded peril. (R. 4).

As noted above, the District Court found that Captain Paprocki was an "assailing thief" under the provisions of the policy and entered final judgment for the

petitioner. Consequently, the District Court did not have reason to address itself to the alternate contentions of Citizens' liability under the like perils clause or under the collision clause.

On appeal, Citizens advanced the argument, not advanced in the court below, that the vessel was captured, seized or taken, within an exclusion of the policy. (R. 1) (Appendix A, p. 6).

In an effort to draw to the attention of the Fifth Circuit the actual contentions raised in the court below, petitioner, S. Felicione & Sons, caused the briefs filed in the lower court to be transmitted as additional parts of the record to the Fifth Circuit on December 16, 1969. The briefs of the trial court conclusively show that the petitioner, Felicione, raised the contentions that the MISS SONDRA LEIGH was lost due to either collision or a like peril to an assailing theft if not by assailing theft per se, all of which were covered perils specifically insured against.

Findings of the Court of Appeals

In its opinion, the Fifth Circuit reversed and rendered the judgment of the District Court, *S. Felicione & Sons Fish Company, Inc. v. Citizens Casualty Company of New York*, 430 F.2d 139 (5th Cir. 1970). (Appendix A).

The Fifth Circuit did not disturb the finding of the District Court that there had been an assailing theft of the MISS SONDRA LEIGH. It held that only "goods aboard a vessel", "property on vessels", "goods on board", or "personal property" were insured against the "assailing theft" peril, although as previously indicated,

the policy described the MISS SONDRA LEIGH, her hull, etc. as the property insured against the peril of assailing thieves. (Appendix A, p. 7, 9, 10).

Additionally, the Fifth Circuit arbitrarily refused to consider Felicione's contention that the MISS SONDRA LEIGH was lost as the result of a "collision" or as a result of a like peril to "assailing theft", which had been raised in the District Court and preserved on appeal. The Fifth Circuit stated:

> "On appeal both parties assert alternative contentions which they did not raise below. Felicione would have us find that if the loss was not typically within the coverage of the 'assailing thieves' provision it was caused by a 'like peril' to that term, or by a like peril to barratry, or by a collision." (Appendix A, p. 6).

Again, in Footnote 2, (Appendix A, p. 11) the Fifth Circuit reiterated its refusal to consider alternate bases of liability, stating:

> "No one until now ever remotely considered collision coverage and properly so, because the MISS SONDRA LEIGH was a total loss *before* the vessel was rammed. The claim of barratry is frivolous because Paprocki was neither master nor mariner of the MISS SONDRA LEIGH. Moreover, the general words 'all other like perils' cannot extend the scope of the policy to include perils beyond and entirely different from those specially enumerated. Feinberg v. Insurance Company of North America, 1 Cir. 1958, 260 F.2d 523, 527." (Appendix A, p. 11).

Additionally, the Fifth Circuit referred to a "survey" which purported to show that the MISS SONDRA LEIGH had been rammed five times while in a capsized

position — three times on the starboard side and twice on the port. (Appendix A, p. 4). No survey was ever placed in evidence in the District Court.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decision of the Supreme Court in Calmar Steamship Corporation v. Scott, 345 U.S. 427 (1953).

In *Calmar*, this Court held that perils or risks insured against (specifically a war risk rider, supplemented by a savings clause) in a marine insurance policy cannot be altered or varied to a meaning other than that which appeared on the face of the policy. In *Calmar* the defendant (an underwriter) had urged a construction other than that appearing on the face of the policy and had proffered expert testimony with reference to the unexpressed subjective intentions of the underwriter in preparation of the rider and a savings clause of the policy. Mr. Justice Frankfurter, speaking for the Court, said:

> "The underwriters resort to a second argument concerning the savings clause. They contend . . . that the clause was meant to save losses which occur while a vessel is under certain Allied restraints, limited in number, but not under others. The underwriters, upon the trial, offered to prove as much by an expert witness. No more need be said than that to vary the terms of the savings clause so as to make it mean what the expert in the District Court said it meant — which on its face it cannot mean — would be to reform the contract, and that the requisites of the equitable doctrine of reformation are not met in this case.
> 345 U.S. at 435."

In line with the law of Florida with respect to construction of the word "theft" in an insurance policy *see American Fire & Casualty Co. v. Sunny South Aircraft Services, Inc.*, 151 So.2d 276, 278 (Fla. 1963), the Fifth Circuit did not disturb the District Court's finding in the present case that the occurrence

constituted an assailing theft of the MISS SONDRA LEIGH; instead, the Fifth Circuit held that despite the description of the insured property as the "MISS SONDRA LEIGH, her hull, tackle, etc.", the "assailing theft" peril could only be invoked as to "goods aboard a vessel", property on vessel", "goods on board" or "personal property."[2]

The Fifth Circuit based its decision upon the "paucity of authority" involving the "theft of an entire vessel".[3] The paucity of authority, as a basis for reforming the description of property in a policy of insurance, should, at the very least, be supported by information regarding the frequency of occurrences which would normally give rise to litigation. In the present case no statistics are available regarding the theft of vessels by force or violence against crews or ships.[4] However,

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[2] Prior to the Fifth Circuit's decision in the instant case, policy provisions in standard marine hull insurance describing "the hull, tackle, machinery, etc." have always been construed to mean that the entire vessel, as a whole, is the property insured and the items enumerated are to be "treated as constituting a unit for the purpose of the policy and not as separate items being insured separately." The *White Star*, 48 F. Supp. 808, 813 (E. D. Mich. 1943).

[3] With respect to the "paucity of authority" involving "theft of an entire vessel" it should be noted that many standard policies include the peril of piracy; however, the last reported decision in the United States involving piracy (robbery at sea — not present here for the reason, among others, that the killing of the crew was not done for the purpose of acquiring the MISS SONDRA LEIGH) appears to be the 1844 case of the *United States* v. *The Cargo of the Brig, Malek Adhel*, 2 Howard 210, 11 L.Ed. 209. Is it to be contended that since there has been no litigation involving piracy for over one hundred years that an act of piracy today would not be a covered peril?

[4] The Fifth Circuit's contention that there are no cases which involve the theft of an entire vessel or which construe the theft peril with regard to a "vessel" is in error. In *Naylor v. Palmer*, 8 Ex. 738, 750 (1853), Sir Jonathan Frederick Pollock, Chief Baron of the Court of the Exchequer, in a case involving the taking of a ship by Chinese Coolies, held that the act of seizing the ship was one of theft or analagous to it under the doctrine of *eiusdem generis* under the concluding words of the perils clause of the policy.

with respect to the assailing theft of "goods and merchandise" (breaking of containers), such incidences are common knowledge in the shipping industry. There are, however, only three reported cases in the United States in which an assailing theft or a "like peril" to an assailing theft has been adjudicated to have occurred *Babbitt, Goode & Co.* v. *Sun Mutual Insurance Co.*, 23 La. Ann. 314 (1871)*; *Feinberg* v. *Insurance Company of North America*, 260 F. 2d 523 (1st Cir. 1958); *Swift* v. *American Universal Insurance Company*, 349 Mass. 637, 212 N.E. 2d 448, 19 A.L.R. 3d 1145 (1965).

With respect to the "paucity of authority" and the history of the theft peril as outlined in *Swift* v. *American Universal Insurance Company*, *supra*, (relied upon by the Fifth Circuit), the term "assailing thieves" was not "coined" by the underwriters as contended by the Fifth Circuit; rather, "thieves" has always been a covered peril under marine policies. The term "assailing" was added to American policies following the decision in the New York case of *Atlantic Insurance Company* v. *Storrow*, 5 Paige 285, 293 (N.Y. Ch. 1835) which held that "furtive" theft not accompanied by violence was a covered "peril". The holding in *Storrow* broke with existing precedents emanating from early English decisions which had held, under policies insuring against "all fortuitous events", *See Spinetti* v. *Atlas Steamship Company*, 80 N.Y. (35 Sickles) 71, 79-80 (1880), that theft accompanied by violence from without the

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* It is to be noted that the policy in *Babbitt, Goode & Co.* which along with *Swift* v. *American Universal Insurance Company*, *supra*, is relied upon by the Fifth Circuit to support its contention that the term "assailing thieves" in a marine hull policy "provides coverage for theft by force or violence of *personal property on vessels*" (Appendix A, p. 7), (emphasis supplied) was *not* a hull policy but was a policy specifically insuring "goods and merchandise" and thus offers no support for the Fifth Circuit's reformation of the present *hull* policy.

vessel was a fortuitous event while furtive theft was a matter within the control of the vessel owner. The term "assailing" was added to American policies following the *Storrow* decision, *supra*, in order to re-establish the element of fortuitousness to the theft peril. *Swift v. American Universal Insurance Co.*, *supra*. The term "assailing" was not, as contended by the Fifth Circuit, "coined" by underwriters to describe and limit property covered but was added to delineate the character of conduct necessary to trigger the existing "theft" peril as to property separately described and insured in the policy. Furthermore, there is nothing inherent in the term "assailing" when added to the "theft" peril which would justify the limitation of the peril to "goods aboard a vessel", "property on vessels", "goods on board", or "personal property" as opposed to the entire vessel (which is described as the property insured) as contended by the Fifth Circuit.[a]

The "paucity of authority' with respect to incidents of "assailing thefts" of entire vessels can no more be

[a] The Fifth Circuit endeavored to support its decision by citing the cases of *Feinberg v. Insurance Company of North America*, *supra*, concluding that there would be no reason to provide, as was done in *Feinberg*, against both "assailing thieves" and "theft of the entire yacht" absent an inherent limitation of the assailing theft peril to "property on board". The Fifth Circuit's reliance upon *Feinberg* is misplaced. The policy in *Feinberg* was not a standard time hull policy. Furthermore, the assailing theft peril was never raised by the vessel owner because the theft was not accompanied by force and violence. *Feinberg* clearly recognized the function of the adventures and perils clause as descriptive of the event or occurrence which gives rise to liability for the loss of property described as insured in the policy. The inclusion of the peril of "theft of the entire yacht" simply served to extend coverage to a stealthy or furtive theft of the yacht. Without the peril of "theft of the entire yacht" the policy would have provided protection only against "assailing thieves" and thus require force or violence as an incident to the theft before the peril could be invoked. It is to be noted that to an extent the dual "theft" perils of the *Feinberg* policy are overlapping and that the underwriters could have just as easily phrased the peril as a "furtive theft of the entire yacht."

used to reform, on the basis of some unexpressed subjective intent of the underwriters, the present policy of insurance than could the testimony of an "expert" with regard to the unexpressed "subjective intentions" of the underwriters in *Calmar*.

The conflict between *Calmar* and the present case clearly justifies the issuing of a Writ of Certiorari to review the judgment of the Fifth Circuit.

II. The Fifth Circuit's decision will adversely affect maritime insurance on a national level.

The Fifth Circuit opinion is of far more than individual concern to the present litigant because of the vast numbers of commercial vessels which are insured under standard marine time hull policies containing identical perils clauses and identical descriptions of "property insured". There are compelling reasons for this Court to assume jurisdiction and to give further guidance to the construction of marine insurance policies. The Fifth Circuit's decision in effect reverses the direction of the guidelines of *Calmar*, *supra*, that policies be construed as written and creates confusion and uncertainty in maritime and marine insurance, a field of law which has long suffered from uncertainty with the consequent detriment to those to whom insurance is extremely vital because of the extent of the risks involved. The Fifth Circuit's reversal of the *Calmar* guidelines raises several pertinent and compelling questions and observations:

1. Are the clear provisions expressed on the face of a marine insurance policy to be disregarded on the basis of a "paucity of authority" and given substance only if previously litigated?

2. Is the insured under a marine insurance policy now required to undertake a long and expensive investigation to determine whether or not he is entitled to rely upon the express provisions of his contract of insurance?[7]

3. Does the adventures and perils clause constitute a statement of the event or occurrence giving rise to coverage, or does it describe the property insured, to the exclusion of a separate statement describing the property to be insured by the policy?

The Fifth Circuit's opinion is certain to add confusion to marine insurance, a field of law heretofore plagued by documents which this Court in *Calmar*, *supra*, N.2 at 432, has described as "clumsy." The guidelines of *Calmar* represent "a judicially established Federal admiralty rule" governing construction of marine policies and an "entrenched Federal precedent" the reversal of which gives this Court compelling justification for the issuance of a Writ of Certiorari to review the present decision of the Fifth Circuit.[8]

III. The petitioner was denied due process of law in that the Fifth Circuit refused to consider alternate bases of liability under the petitioner's marine insurance policy.

The District Court did not rule upon certain alternate bases of liability (collision and like perils to assailing theft) presented in the District Court by the peti-

[7] Heretofore, this Court has expressly declined and refused to impose such a duty upon any insured in a marine policy. See *London Assurance v. Companhia de Moagens do Barreiro*, 167 U.S. 149, 159 (1896).

[8] *Wilburn Boat Company v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 314 (1954); *Fireman's Fund Insurance Co. v. Wilburn Boat Co.*, 300 F. 2d 631, 647 N. 12 (5th Cir. 1962).

tioner. Such a determination was rendered unnecessary by the District Court's finding of liability under the assailing theft peril. The Fifth Circuit upon reversing the District Court as to the liability under the "assailing theft" peril expressly declined to consider petitioner's alternate bases of liability under its policy on the ground that such had not been presented to the District Court. (Appendix A, p. 6). The Fifth Circuit was in complete and total factual error in its assumption. The petitioner presented the alternate bases of "collision" and "like peril" to assailing theft to the lower Court.[9]

The present case was tried on briefs in the lower Court, and these briefs were transmitted to the Fifth Circuit as a part of the record in the cause. A review of the trial briefs conclusively reveals that all bases for liability under the policy of insurance which were raised in the Fifth Circuit were presented to the District Court. The refusal of the Fifth Circuit to even consider petitioner's alternate contentions cannot be simply ascribed to oversight but, in view of the state of the record, must be attributed to a conscious and purposeful refusal by the Fifth Circuit to consider the record in the cause.

The petitioner's alternate contentions have never been litigated. Collision as a peril of the seas includes a collision between the insured vessel and any other object, including another vessel.[10]

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[9] The petitioner recognizes that if the Fifth Circuit's reformation of the present policy with respect to the "assailing theft" peril is valid, there can be no "like peril" to an "assailing theft" under the doctrine of ejusdem generis. However, petitioner would still be entitled to have his contention that the present loss was the result of a "collision" within the meaning of the policy determined in the proper forum.

[10] *Raybold v. United States*, 82 U.S. (15 Wall.) 202 (1872); *St. Paul Fire & Marine Insurance Co. v. Pacific Cold Storage*, 157 F. 625 (9th Cir. 1907).

The MISS SONDRA LEIGH was struck by the ESTO FLEET three times, once on the starboard and twice on the port, within the view of the only eye witness to the incident. While no marine survey was ever introduced into evidence or placed before the District Court, the Fifth Circuit referred to a "survey" of the vessel which Citizens had referred to a "survey" of the peal. (Appendix A, p. 4). The "survey" purported to show that the vessel had been rammed five times. The obvious basis of the Fifth Circuit's factual determination that the vessel was a total loss before she was rammed was the fact that she was riding low in the water when Captain Grisham first observed her. If indeed the vessel were "sunk down to her decks" before Captain Grisham saw her rammed three times, it can only be inferred, from the survey referred to by the Fifth Circuit, that the cause of her riding so low in the water was two prior rammings on the starboard side, not observed by Captain Grisham. It is to be noted, however, that no matter when the vessel was rammed, or how many times, there was absolutely no evidence before the District Court or the Fifth Circuit of any activity which would have rendered the vessel a total loss other than the hull having been rent by a *collision* — a covered peril.[11]

The action of the Fifth Circuit in reversing and rendering the cause and refusing to consider issues properly presented by the petitioner and in refusing to remand the case for the consideration of those issues provided the petitioner only with the right to be heard

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[11] Given a proper forum and the proper opportunity, petitioner could show that the filling of a wooden-hulled vessel with water, even for an extended period of time, does not result in a total loss or even a constructive total loss. It is only when the hull is rent by a collision that the loss becomes total or constructively total.

upon a portion of its case and denied it the right to have a full determination of its case. To the extent that the Fifth Circuit refused to consider those issues but instead made findings of fact de hors the record, it failed to respect the province and function of the District Court. *Barry v. Edmonds*, 116 U.S. 550 (1885). Moreover, in rendering its judgment the Fifth Circuit has denied petitioner due process of law in the "primary and fundamental sense of an opportunity to be heard and to defend its [petitioner's] substantive right". *Brinkerhoff-Farris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 678 (1929).

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHESTER H. FERGUSON

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Counsel for Petitioner

CHARLES F. CLARK

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Of Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of December, 1970, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Baya M. Harrison and John T. Allen, Jr., Counsel for the Respondent, and Harrison, Greene, Mann, Davenport, Rowe and Stanton, the 10th Floor, First Federal Building, St. Petersburg, Florida 33701, of Counsel. I further certify that all parties required to be served have been served.

CHESTER H. FERGUSON

of MACFARLANE, FERGUSON, ALLISON & KELLY
P. O. Box 1531, Tampa, Fla. 33601

Counsel for Petitioner

APPENDIX A

OPINION AND JUDGMENT
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28319

S. FELICIONE & SONS FISH COMPANY, INC.,

Plaintiff-Appellee.

versus

CITIZENS CASUALTY COMPANY OF NEW YORK,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(July 23, 1970)

Before GODBOLD, DYER and MORGAN, Circuit Judges.

DYER, Circuit Judge: This bizarre saga of the seas — involving a double murder and ship scuttling by a drunkenly irrational master — is not only novelesque, but leaves novel legal consequences in its wake. It begins on November 9, 1967, when the MISS SONDRA LEIGH owned by plaintiff, S. Felicione & Sons Fish Company, Inc., under the command of Captain Lee Tindall, and with two crewmen on board, the rigman, Duhon, and an unidentified Mexican shrimp header, departed Port Isabelle, Texas, to fish for shrimp on the flats of Campeche, Mexico. She arrived about November 14, 1967, and fished the waters until November 18, 1967, when she, along with ten or fifteen other

fishing vessels, congregated on the flats to discharge her catch into the vessel JUNE, a service boat which would take the catch into port.

The MISS SONDRA LEIGH dropped anchor in the vicinity of the JUNE about 3:30 P.M., some ten to twenty miles in the Gulf of Mexico in international waters. The ESTO FLEET, a 72 foot steel hulled vessel, commanded by Captain Frank Paprocki, was anchored about 150 yards to the starboard of the MISS SONDRA LEIGH. The shrimp was transferred from the MISS SONDRA LEIGH to the JUNE just before dark. During the transfer of the shrimp the ESTO FLEET came portside and made up to the MISS SONDRA LEIGH. Captain Paprocki emerged from the wheel house of the ESTO FLEET, apparently under the influence of alcohol, with a gun in one hand and a bottle of whiskey in the other. He shot into the air and the water and then fired two shots into the galley and wheelhouse of the MISS SONDRA LEIGH. Captain Tindall told Captain Paprocki to stop shooting the gun. This request made Captain Paprocki mad and he began arguing violently with Captain Tindall.

Captain Paprocki then boarded the MISS SONDRA LEIGH and asked Captain Tindall and Duhon to drink with him. They refused. Captain Paprocki boarded the vessel portside to the MISS SONDRA LEIGH and then returned. He refused to disengage the ESTO FLEET, so the MISS SONDRA LEIGH got underway with the ESTO FLEET in tow. Duhon went below to prepare an ice bed for further shrimping. He heard two shots from the bow and, shortly after that, two shots by the hatch.

Duhon came topside and saw Captain Tindall dead, lying on the nets on the starboard side. The Mexican national was also dead, lying on the bow next to the hatch. Duhon ran to his sleeping quarters, grabbed a life jacket and, as he emerged, Captain Paprocki appeared from an after door of the ESTO FLEET and said "You are next." Duhon jumped overboard. Paprocki fired twice but missed. Duhon was picked up about twelve hours later by a Mexican fishing boat.

On the next morning, November 19, 1967, Captain Grisham of the TOBY JEAN saw the ESTO FLEET towing the MISS SONDRA LEIGH, tied up alongside, towards the open sea. The MISS SONDRA LEIGH was partially submerged and no one appeared to be on board her. Captain Grisham contacted Captain Paprocki by radio and was informed by him that the MISS SONDRA LEIGH had sprung a leak and that its crew was on the beach. Captain Paprocki appeared to be drunk, or at any rate not in a normal condition. Captain Grisham followed the ESTO FLEET.

Early in the afternoon Captain Grisham saw the MISS SONDRA LEIGH strung out aft of the ESTO FLEET on a single line, sunk down to her decks but still upright. Captain Paprocki pulled the MISS SONDRA LEIGH back and forth until he capsized her, cut his line to her, rammed her three times with the steel-hulled ESTO FLEET, and departed. Captain Grisham tied a buoy to the rudder shoe of the MISS SONDRA LEIGH and returned to Port Isabelle.

On November 20, 1967, the MISS SONDRA LEIGH was towed from twenty miles to within five miles offshore Mexico, at which time Captain Tindall's body was discovered chained inside the fishhold. The Mexican national's body was later discovered chained to the fuel tank.

The vessel was a constructive total loss. A survey showed that it had been rammed three times on the starboard side and two times on the port side while in a capsized position by a vessel with a V-shaped hull. The port side was holed in three areas. Two bullet holes were found aft of the hatch, favoring the starboard side of the pilot house, three in the overhead area and four bullet holes aft of the fishhold hatch in the aft deck near the center of the deck.[1]

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[1] As an epilogue we are told that Captain Paprocki and the ESTO FLEET vanished and have not been seen or heard from.

The policy issued to plaintiff by defendant Citizens Casualty Company of New York provided coverage of the MISS SONDRA LEIGH in the familiar, aphoristic terms:

> Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein.

The policy further provides:

> Notwithstanding anything to the contrary in this policy, this insurance is warranted free from any claim for loss, damage, or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise * * *.
>
> Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

The District Court, trying the case without a jury, found as conclusions of law:

> "1. When Captain Paprocki lashed down the bodies of the dead seamen to the MISS SONDRA LEIGH and towed her seaward, casting her away by towing her so as to sink her and then exhorting a final flourish by ramming her, he acted with force against the insured property with the intention of permanently depriving the owner of the property so as to fall within the provision of the policy insuring against loss from 'assailing thieves.' Captain Paprocki was an assailing thief.

"2. The defense of piracy was not established. Captain Paprocki was not a pirate, nor did his action of permanently depriving the owner of the pro- The actions of Captain Paprocki were more in the nature of irrational murder and an attempt to destroy the evidence than that of 'robbery, murder or forceable depredation on the high seas, without lawful authority, in the spirit and intention of universal hostility.' "

Final judgment was entered for the plaintiff for the full amount of the policy and this appeal ensued. The question of coverage of defendant's policy for the irrational conduct of Captain Paprocki is the sole issue to be determined in this appeal.

It is too well settled to require citation that the burden of proving a loss by a peril insured against is on the insured. To meet this burden Felicione, in the District Court, asserted that the loss was occasioned by "assailing thieves." Citizens defended in the District Court on the ground that the proximate cause of Felicione's loss was Paprocki's piratical act, a peril excluded in the policy. The District Court agreed with Felicione.

On appeal both parties assert alternative contentions which they did not raise below. Felicione would have us find that if the loss was not technically within the coverage of the "assailing thieves" provision it was caused by a "like peril" to that term, or by a like peril to barratry, or by a collision. Citizens now adds the argument that the vessel was captured, seized or taken, all of which were excluded perils. We decline the invitation of both parties to interpret and construe the recondite niceties of verbiage in an ancient clause of an insurance policy, none of which were presented to or decided by the lower court. We are content to limit our inquiry to what was decided below, *viz.*, was Paprocki an "assailing thief"? Since the burden is upon Felicione to prove the loss was caused by a peril specifical-

ly insured against, we need not determine whether the MISS SONDRA LEIGH was lost through a peril specifically excluded by the policy terms.

In this frame of reference the actions of Paprocki are pivotal. He and Captain Tindall were very close friends. He came aboard in an intoxicated condition with a fifth of whiskey in one hand and a gun in the other and wanted Captain Tindall and the crew to have a drink with him. They refused. He sat on the deck and continued drinking. Later, in an irrational condition, Paprocki murdered Tindall and one of the crew and attempted to murder the other crewman who avoided such a fate by jumping overboard with Paprocki blazing away at him. Then Paprocki sank the vessel. Under these conditions was Paprocki an assailing thief? We think not.

There was no evidence that Paprocki came aboard to steal or did steal anything from the MISS SONDRA LEIGH. Nor was he bent upon stealing the vessel. Crazy as he was, Paprocki scuttled the vessel in an obvarious attempt to cover up his heinous crimes.

We are convinced that the term "assailing thieves" in marine policies provides coverage for theft by force or violence of personal property on vessels, not coverage for the theft of the vessel itself. We have researched the subject exhaustively. All the authorities we found dealing with the term "assailing thieves" arise in the context of taking of goods aboard a vessel; none construe the term with references to a taking of the vessel itself. *See, e.g., Swift v. American Universal Ins. Co.*, Mass. 1965, 212 N.E.2d 448, 1966 A.M.C. 269 and cases there cited; *Babbitt, Goode & Co. v. The Sun Mutual Insurance Company*, 1871, 23 La.Ann. 314; *Annot.*, 19 A.L.R.3d 1150.

The term "assailing thieves" is of long standing, but has been infrequently defined. Its historical contour

was succinctly developed in *Swift v. American Universal Ins. Co., supra,* (personal property valued at $3,600 taken from yacht cabin) where the court said:

> It appears that, in times long past, marine insurance policies covered losses at the hands of "Pirates, Rovers [and] Thieves." *Beawes, Lex Mercatoria Rediviva,* 245 (1754). *Jacob, Law-Dictionary,* Vol II, Insurance, I, 1 (1797). The word "thieves" in marine insurance was held to apply to persons, not connected with the insured vessel, who committed thefts by force or violence in *Marshall vs. Nashville Marine & Fire Ins. Co.,* 20 Tenn. 99, 101 (1839). At approximately the same time, however, in New York, the meaning of "thieves" in marine insurance was held to include secret and nonviolent larceny even though committed by persons employed or working on the vessel. *Atlantic Ins. Co. vs. Storrow,* 5 Paige, 285, 293 (N.Y. Ch., 1835), *American Ins. Co. vs. Bryan,* 26 Wendell 563, 573-574 (N.Y. Ct. Error, 1841).
>
> In order to avoid the consequences of the construction given to the word "thieves" in the New York cases, marine insurers inserted the word 'assailing" to modify the noun "thieves." 10 *British Shipping Laws (Arnould, Marine Insurance* [15th ed.]), par. 834. The term "assailing thieves" has been interpreted to include robbery by force and violence. *Paddock vs. Commercial Ins. Co.,* 2 Allen 93, 101. *Cleveland Twist Drill Co. (Great Britain), Ltd. vs. Union Ins. Soc.* 23 Lloyd, L.R. 50, 53 (C.A.), *See Feinberg vs. Insurance Co. of No. America,* 1958 A.M.C. 1277, 161 F. Supp. 686 (D. Mass.), revd. on other grounds, 1959 A.M.C. 11, 260 F.(2d) 523 (1 Cir., 1958). In our view the element of force or violence implicit in the phrase "assailing thieves" is not limited to violence against the person, as in robbery, but also includes force applied to the ship or to the insured goods in the perpetration of the theft. The construction was applied by the King's

> Bench to facts analogous to those in the instant case. See *La Fabrique de Produits Chimiques Society Anonyme vs. Large,* [1923] 1 K.B. 203, 208.

Id. at 271-62.

In D. Winter, *Marine Insurance* (3rd Ed. 1952) the author in discussing theft of goods on board ship says:

> [M]any years ago no underwriter ever considered insuring against petty thievery, now commonly known as theft and pilferage. The underwriter was willing to protect a merchant against assailing thieves, against whose activities he was powerless to protect himself.

Id at 87.

• • •

> The peril of thieves, as covered by the marine-insurance policy, is generally recognized by merchants and by the textbook writers as that of the taking of property by force, as distinguished from taking by stealth, which latter form of larceny is known by the specific term pilferage. It was always the intention of underwriters to protect *property on vessels* from losses occasioned by the criminal acts of those who obtained access to the property by force. Pilferage, however, was not contemplated by the underwriter when property was insured, because such loss was supposed to be the resuult of the criminal acts of those who had a right to be with the property, such as stevedores or others who by stealth mingled with them and thus had access to the *goods*. Unfortunately, this theory and practice were overridden in certain state courts, where the judge, in an academic discusion of the meaning of the word "thieves" ignored for the most part the practice of the merchants and underwriters which, of the word "thieves" ignored for the most part the was determined and held that the word "thieves" covered what is commonly known in marine circles

> as pilferage. Accordingly, most policies in use in the United States have inserted the words "assailing thieves" in order to make clear the original and present intention of underwriters insuring against thieves. (Emphasis supplied)

Id at 184. *See also Arnould's Eleventh Edition* § 837, at 1088.

We think that the paucity of authority construing the term "assailing thieves" with reference to theft of a vessel (as opposed to theft of goods on board) demonstrates that it was so generally understood that the term never contemplated theft of entire vessels that no effort was made before this case to litigate the point. If the "assailing thieves" peril contemplated theft of the entire vessel, there would be no reason to provide protection, as was done in the policy involved in *Feinberg v. Insurance Company of North America*, D. Mass. 1958, 161 F. Supp. 686, 1958 A.M.C. 1277, *vacated*, 260 F.2d 523, against *both* "assailing thieves" *and* "theft of the entire yacht." We entertain no doubt that the term "assailing thieves" is limited to personal property aboard the vessel taken by force. It is a descriptive phrase, purposefully and precisely coined by the underwriters to distinguished between the theft of personal property by stealth, such as pilferage, and that taken by force. It has nothing whatever to do with insuring against the theft of an entire vessel.

In the case *sub judice* it is undisputed that Captain Paprocki was a madman. But assuming that he had some degree of rationality when he came aboard the MISS SONDRA LEIGH, there is no evidence that he had any intention to steal nor did he steal any personal property from the vessel. Thus there was a complete absence of proof that there was coverage under the "assailing thieves" peril.

Concluding, as we do, that the loss of the MISS SONDRA LEIGH was not covered by a peril contemplated by either party or insured against in the marine policy issued by Citizens Casualty to Felicione, the judgment of the District Court is reversed and the cause is rendered.[2]

REVERSED and RENDERED.

---

[2]As we pointed out, we have declined to consider the arguments of Felicione made for the first time on appeal that the loss was a "like peril to that of assailing thieves," or was a like peril to that of "barratry," or was a "collision." Only to prevent a miscarriage of justice must we give heed to such hopefully bolstering afterthoughts. *E.g., McCrea v. Harris County Houston Ship Channel Navigation District*, 5 Cir. 1970, 423 F.2d 605, 610, n. 19; *American Surety Co. of N.Y. v. Coblentz*, 5 Cir. 1967, 381 F.2d 185. This is plainly not such a case and deserves but scant passing remarks. No one until now ever remotely considered collision coverage and properly so, because the MISS SONDRA LEIGH was a total loss *before* the vessel was rammed. The claim of barratry is frivolous because Paprocki was neither master nor mariner of the MISS SONDRA LEIGH. Moreover, the general words "all other like perils" cannot extend the scope of the policy to include perils beyond and entirely different from those specially enumerated. *Feinberg v. Insurance Company of North America*, 1 Cir. 1958, 260 F.2d 523, 527.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28319

D. C. Docket No. Civil T. 68-215

S. FELICIONE & SONS FISH COMPANY, INC.,
Plaintiff-Appellee,

versus

CITIZENS CASUALTY COMPANY OF NEW YORK,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before GODBOLD, DYER and MORGAN, Circuit Judges

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered in accordance with the opinion of this Court.

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

July 23, 1970

Issued As Mandate:

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW

OF THE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

S. FELICIONE & SONS FISH COMPANY, INC., *Plaintiff*,	)	
vs.	)	No. 69-215-Civ. T.
CITIZENS CASUALTY COMPANY OF NEW YORK, *Defendant*.	)	

ORDER

THIS CAUSE was removed from the jury calendar and submitted to the Court on briefs, and the Court having considered the briefs and being otherwise fully advised in the premises, makes the following:

FINDINGS OF FACT

1. This Court has diversity jurisdiction.

2. This is a suit brought by the Plaintiff, S. Felicione & Sons Fish Company, Inc., a Florida corporation, to recover on a policy of insurance sold and issued to it by the Defendant, Citizens Casualty Company of New York, a New York corporation.

3. The policy of insurance provided hull and machinery coverage to the wood hulled 68-foot diesel shrimper MISS SONDRA LEIGH, which was caused to be sunk and was a constructive total loss as a result of certain events in the Gulf of Mexico upon or near the Campeche Flats on or about November 19, 1967, a date on which the policy of insurance offered by Plaintiff was in full force and effect.

4. The Plaintiff seeks to recover the agreed value of the MISS SONDRA LEIGH of $34,000, as specified in the valued policy of insurance issued by the Defendant.

5. The Defendant insurer contends there was no coverage under the policy and that the loss was within certain exclusions of the policy. The Defendant calls atention to lines 15-17 of the policy as follows:

> Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein.

Specifically, the Defendant contends that the relevant exclusion is found on lines 162 and 163 of the policy as follows:

> Further warranted free from the consequences of civil war, resolution, [sic] rebellion, insurrection, or civil strife arising therefrom, or *piracy*. (Emphasis is Defendant's)

6. The MISS SONDRA LEIGH left Port Isabel, Texas, on November 9, 1967, under the command of Captain Lee Tindall, to fish the flats of Campeche, arriving in that area on or about November 13 or 14, 1967. She fished the waters for three or four days until on or about November 18, 1967, at which time, she, along with ten or fifteen other fishing vessels, congregated on the flats to discharge their catches onto the vessel JUNE, a service boat which would take the catch into port.

7. In addition to Captain Tindall, the MISS SONDRA LEIGH had two crewmen on board, the rigman, Lewis Duhon, and the header, an unidentified man of Mexican descent who had been aboard for only a short period of time.

8. The MISS SONDRA LEIGH arrived in the area of the vessel JUNE and dropped anchor at approximately 3:30 p.m. on November 18, 1967. At that time the ESTO FLEET, a 72 foot steel-hulled vessel under the command of Captain Frank Paprocki, was anchored about 150 yards to the starboard of the MISS SONDRA LEIGH.

9. Just before dark, the MISS SONDRA LEIGH transferred her shrimp to the trawler JUNE. During the transfer of shrimp, the ESTO FLEET came port side to the MISS SONDRA LEIGH and made up to her. Captain Paprocki came out of the wheelhouse of the ESTO FLEET with a gun in one hand and a bottle of whiskey in the other, and "shot clean through the galley and everything else" (of the MISS SONDRA LEIGH). Captain Paprocki then came aboard the MISS SONDRA LEIGH and asked Captain Tindall and crewman Duhon to drink with him. They declined. Captain Paprocki left to go aboard the vessel port side to the MISS SONDRA LEIGH and then returned to sit down on the aft deck of the MISS SONDRA LEIGH. His gun was in his belt at that time. Captain Paprocki refused to move the ESTO FLEET so that the MISS SONDRA LEIGH could get underway. He told Captain Tindall to take the ESTO FLEET in tow. Thereafter the MISS SONDRA LEIGH got underway with the ESTO FLEET in tow. Lewis Duhon went below to make an ice bed in the hold for groceries and while below, he heard four shots. Duhon thought Captain Paprocki was "just still playing with that gun."

10. When Duhon came topside, he saw Captain Tindall, dead, on the nets on the starboard side, and the Mexican national, dead, on the bow next to the hatch. Duhon ran to the sleeping quarters, grabbed a life jacket and, as he emerged, Captain Paprocki came out from an after door of the ESTO FLEET and said, "You are next." Duhon jumped overboard. Paprocki fired twice

but missed. Duhon was in the water for approximately 12 hours and was then picked up by a small Mexican fishing boat.

11. On or about 0600 hours on the morning of November 19, 1969, [sic] Captain Oscar Grisham of the TOBY GENE saw the ESTO FLEET alongside the MISS SONDRA LEIGH. The ESTO FLEET was in the act of towing the MISS SONDRA LEIGH toward open sea. At this time the MISS SONDRA LEIGH was partially submerged. Captain Grisham could see no one on board the MISS SONDRA LEIGH at this point and dropped off and radioed Captain Paprocki and was informed by him that the MISS SONDRA LEIGH had sprung a leak. Captain Grisham requested that Captain Paprocki give him the boat so that he could pump it out and take care of it, and he also inquired as to the crew and was informed that the crew of the MISS SONDRA LEIGH were on the beach. Over the radio Captain Paprocki appeared to be drunk, or at any rate that he was not in normal condition.

12. Captain Grisham followed the ESTO FLEET and early in the afternoon he observed the MISS SONDRA LEIGH, strung out aft of the ESTO FLEET on a single line, sunk down to her decks but still upright. Captain Paprocki pulled the MISS SONDRA LEIGH back and forth until he capsized her, cut his line to her, rammed her three times with the steel hulled ESTO FLEET, and departed. Captain Grisham made up a buoy and tied it to the rudder shoe of the MISS SONDRA LEIGH and returned to Port Isabel.

13. The MISS SONDRA LEIGH was towed from thirty miles offshore to within five miles offshore of Mexico on November 20, 1967, at which time Captain Tindall's body was discovered chained inside the fish hole. The body of the Mexican national was discovered later chained to the fuel tank. The vessel was surveyed on November 20, 1967, and was a constructive total loss.

CONCLUSIONS OF LAW

1. When Captain Paprocki lashed down the bodies of the dead seamen to the MISS SONDRA LEIGH and towed her seaward, casting her away by towing her so as to sink her, and then exorting a final flourish by ramming her, he acted with force against the insured property with the intention of permanently depriving the owner of the property so as to fall within that provision of the policy insuring against loss from "assailing thieves." Captain Paprocki was an assailing thief.

2. The Court holds that the defense of piracy has not been established. Captain Paprocki was not a pirate, nor did his actions fall within the ordinary definition of piracy. The actions of Captain Paprocki were more in the nature of irrational murder and an attempt to destroy the evidence than that of "robbery, murder, or forcible depredation on the high seas, without lawful authority, *in the spirit and intention of universal hostility*. Rene de Kerchove, *International Maritime Dictionary* (1960 Edition).

3. Plaintiff is entitled to judgment against the Defendant in the amount of $34,000.00, together with interest thereon from December 27, 1967, and his costs.

DONE and ORDERED at Tampa, Florida this 29th day of May, 1969.

Joseph P. Lieb

UNITED STATES DISTRICT JUDGE

APPENDIX C

ORDER
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
DENYING PETITION FOR REHEARING

C-2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28319

S. FELICIONE & SONS FISH COMPANY, INC.,

Plaintiff-Appellee,

versus

CITIZENS CASUALTY COMPANY OF NEW YORK,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 23, 1970, 5 Cir., 1970, _____F.2d_____).

(September 18, 1970)

Before GODBOLD, DYER and MORGAN, Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX D

ORDER
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
GRANTING NINETY DAYS STAY OF MANDATE

D-2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CITIZENS CASUALTY CO. OF NEW YORK, *Appellant*,	)	
versus	)	No. 28319
S. FELICIONE & SONS FISH CO., INC., *Appellee*.	)	

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 90 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 90 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 90 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 5th day of October, 1970.

s/ DAVID W. DYER
UNITED STATES CIRCUIT JUDGE

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1084

S. FELICIONE & SONS FISH COMPANY, INC.,
Petitioner,

v.

CITIZENS CASUALTY COMPANY OF NEW YORK,
Respondent

BRIEF OF RESPONDENT ON PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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JURISDICTION

In this brief, Petitioner S. Feliciene & Sons Fish Company, Inc., who was the Plaintiff in the District Court in and for the Middle District of Florida, Appellee in the United States Court of Appeals for the Fifth Circuit, will be referred to as "Petitioner". Respondent Citizens Casualty Company of New York, who was the Defendant in the United States District Court in and for the Middle District of Florida, Tampa Division, and

Appellant in the United States Court of Appeals for the Fifth Circuit will be referred to as "Respondent". The following symbols will be used:

A - Appendix of Petitioner, S. Feliciane & Sons Fish Company, Inc.

B - Brief of Petitioner, S. Feliciane & Sons Fish Company, Inc.

This Petition for Writ of Certiorari is governed by Rule 19(1)(b) of the Supreme Court Rules:

> "Where a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial laws; or has decided an important question of Federal law which has not been, but should be, settled by this Court; or has decided a Federal question in a way in conflict with applicable decisions of this Court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by lower court, as to call for an exercise of this Court's power of supervision."

It is plain that jurisdiction must depend upon conflict with another decision of the Supreme Court or another Court of Appeals. *Apparently*, Petitioner seeks to assert jurisdiction on the basis of conflict with *Calmar Steamship Corporation v. Scott*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739, and the claim that Petitioner was deprived of due process of law by the decision rendered by the Fifth Circuit Court of Appeals in *S. Feliciane & Sons Fish Company, Inc. v. Citizens Casualty Company of New York* (5th Cir. 1970) 430 F.2d 136. (A 2-11) (B 2-3)

Petitioner primarily awaits the merits of the Circuit Court of Appeals' decision questioning the legal propriety of the finding that the peril "assailing thieves" was incorrectly defined by the Court of Appeals' decision. In reality, Petitioner seeks a second appeal on the merits here supported by unrealistic and completely inadequate grounds for invoking jurisdiction of this Court on Petition for Writ of Certiorari. A cursory review of Calmar, supra, and the frail claim of denial of due process reveals the complete lack of merit of this Petition.

It is therefore the initial contention of Respondent that the Petitioner has wholly failed to show grounds for invoking the jurisdiction of this Court under Supreme Court Rule 19(1)(b).

QUESTIONS PRESENTED

POINT I

DOES THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR CONFLICT WITH *CALMAR* v. *SCOTT*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739?

POINT II

HAS PETITIONER BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE AT BAR?

POINT III

WAS THERE COVERAGE UNDER RESPONDENT'S MARINE INSURANCE POLICY FOR THE CONSTRUCTIVE TOTAL LOSS OF THE MISS SONDRA LEIGH?

STATEMENT OF THE CASE

On November 9, 1967, the MISS SONDRA LEIGH owned by plaintiff, S. Pelicione & Sons Fish Company, Inc., under the command of Captain Lee Tindall, and with two crewmen on board, the rigman, Dubon, and an unidentified Mexican shrimp header, departed Port Isabelle, Texas, to fish for shrimp on the flats of Campeche, Mexico. She arrived about November 14, 1967, and fished the waters until November 18, 1967, when she, along with ten or fifteen other fishing vessels, congregated on the flats to discharge her catch into the vessel JUNE, a service boat which would take the catch into port.

The MISS SONDRA LEIGH dropped anchor in the vicinity of the JUNE about 3:30 P. M., some ten to twenty miles in the Gulf of Mexico in international waters. The ESTO FLEET, a 72 foot steel hulled vessel commanded by Captain Frank Paprocki, was anchored about 150 yards to the starboard of the MISS SONDRA LEIGH. The shrimp was transferred from the MISS SONDRA LEIGH to the JUNE just before dark. During the transfer of the shrimp the ESTO FLEET came portside and made up to the MISS SONDRA LEIGH. Captain Paprocki emerged from the wheel house of the ESTO FLEET, apparently under the influence of alcohol, with a gun in one hand and a bottle of whiskey in the other. He shot into the air and the water and then fired two shots into the galley and wheelhouse of the MISS SONDRA LEIGH. Captain Tindall told Captain Paprocki to stop shooting the gun. This request made Captain Paprocki mad and he began arguing violently with Captain Tindall.

Captain Paprocki then boarded the MISS SONDRA LEIGH and asked Captain Tindall and Dubon to drink with him. They refused. Captain Paprocki boarded the vessel portside to the MISS SONDRA LEIGH and then returned. He refused to disengage the ESTO FLEET, so the MISS SONDRA LEIGH got underway with the ESTO FLEET in tow. Dubon went below to prepare an ice bed for further shrimping. He heard two shots from the bow and, shortly after that, two shots by the hatch.

Dubon came topside and saw Captain Tindall dead, lying on the nets on the starboard side. The Mexican national was also dead, lying on the bow next to the hatch. Dubon ran to his sleeping quarters, grabbed a life jacket and, as he emerged, Captain Paprocki appeared from an after door of the ESTO FLEET and said "You are next." Dubon jumped overboard. Paprocki fired twice but missed. Dubon was picked up about twelve hours later by a Mexican fishing boat.

On the next morning, November 19, 1987, Captain Grisham of the TOBY JEAN saw the ESTO FLEET towing the MISS SONDRA LEIGH tied up alongside towards the open sea. The MISS SONDRA LEIGH was partially submerged and no one appeared to be on board her. Captain Grisham contacted Captain Paprocki by radio and was informed by him that the MISS SONDRA LEIGH had sprung a leak and that its crew was on the beach. Captain Paprocki appeared to be drunk, or at any rate not in normal condition. Captain Grisham followed the ESTO FLEET.

Early in the afternoon Captain Grisham saw the MISS SONDRA LEIGH strung out aft of the ESTO FLEET on a single line, sunk down to her decks but still upright. Captain Paprocki pulled the MISS SONDRA LEIGH back and forth until he capsized her, cut his

line to her, rammed her three times with the steel-hulled ESTO FLEET, and departed. Captain Grisham tied a buoy to the rudder shoe of the MISS SONDRA LEIGH and returned to Port Isabelle.

On November 20, 1967, the MISS SONDRA LEIGH was towed from twenty miles to within five miles offshore Mexico, at which time Captain Tindall's body was discovered chained inside the fish-hold. The Mexican national's body was later discovered chained to the fuel tank.

The vessel was a constructive total loss. A survey showed that it had been rammed three times on the starboard side and two times on the port side while in a capsized position by a vessel with a V-shaped hull. The port side was holed in three areas. Two bullet holes were found aft of the hatch, favoring the starboard side of the pilot house, three in the overhead area and four bullet holes aft of the fishhold hatch in the aft deck near the center of the deck.

The policy issued to the plaintiff by defendant Citizens Casualty Company of New York provided coverage of the MISS SONDRA LEIGH in the familiar, aphoristic terms:

> Touching the adventures and perils which this Company is contented to bear and take upon itself, they are of the waters named herein, fire, lightning, earthquake, assailing thieves, jettisons, barratry of the master and mariners and all other like perils that shall come to the hurt, detriment or damage of the vessel named herein.

The policy further provides:

> Notwithstanding anything to the contrary in this policy, this insurance is warranted free from claim for loss, damage, or expense caused by or

resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat or any taking of the vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise * * *.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection, or civil strife arising therefrom, or piracy.

The District Court, trying the case without a jury, found as conclusions of law:

"1. When Captain Paprocki lashed down the bodies of the dead seamen to the MISS SONDRA LEIGH and towed her seaward, casting her away by towing her away so as to sink her and then exhorting a final flourish by ramming her, he acted with force against the insured property with the intention of permanently depriving the owner of the property so as to fall within the provision of the policy insuring against loss from 'assailing thieves.'

Captain Paprocki was an assailing thief.

"2. The defense of piracy was not established. Captain Paprocki was not a pirate, nor did his actions fall within the ordinary definition of piracy. The actions of Captain Paprocki were more in the nature of irrational murder and an attempt to destroy the evidence than that of 'robbery, murder or forceable depredation on the high seas, without lawful authority, in the spirit and intention of universal hostility.'"

ARGUMENT

POINT I

DOES THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR CONFLICT WITH *CALMAR v. SCOTT*, N.Y. 1953, 345 U.S. 427, 97 L.Ed. 1125, 73 S.Ct. 739?

In the *Calmar* case, supra, Calmar Steamship Corporation purchased "voyage" insurance from Scott which contained a war-risk rider insuring the vessel PORTMAR. A "British capture warranty" under the war-risk policy was described by this Court as follows:

> "A further warranty, known as the free of British capture warranty, carves a specific exception out of the war-risk rider. It holds the underwriters 'free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions . . . or allies, or by any forces acting in cooperation with or under the control of them or any of them.'
>
> "But a saving clause, following immediately, provides that 'unless the insured Vessel *is condemned this warranty shall not exclude losses otherwise covered by this policy* which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.'" (Emphasis supplied)

The PORTMAR left San Francisco, U.S.A., November 28, 1941, for Manila. She was at sea on December 7, 1941, when Pearl Harbor was attacked and diverted by the United States to Sydney, Australia. From there, she was sent to Brisbane, Port Darwin, Koepang (Island of

Timore - where she was attacked by enemy aircraft) and was finally returned to Darwin. After her return from the naval and air attack the PORTMAR was bombed and strafed by Japanese aircraft and abandoned at Port Darwin, thus becoming a constructive total loss.

This Court was called upon to determine two questions in this decision: Whether the British capture warranty excluded the loss and whether the voyage ended when the PORTMAR was requisitioned by a British ally.

The first question was decided in favor of coverage:

"Assuming that the policy was in force when the Portmar was attacked, there is no doubt whatever that the underwriters would be liable for the damages under the basic adventures and perils clause taken alone. Cf Standard Oil Co. v. United States, 267 US 76, 69 L ed 519, 45 S Ct 211. The capture and seizure warranty, on the other hand, would, of course, hold the underwriters free. We understand the war-risk rider to provide as follows: Risks which are covered by the adventures and perils clause, but which are excluded by the capture and seizure warranty, and only such risks, remain covered. These risks include, in the language of the adventures and perils clause, "Restraints and Detainments of all Kings, Princes and People," or, in that of the capture and seizure warranty, "restraint or detainment, or the consequences thereof . . . or any taking of the Vessel by requisition or other-

*[434]

wise." *The free of British capture warranty would, in turn, again very likely avoid liability in this case. But the war-risk rider makes the loss of the Portmar one which is "otherwise covered by this policy" within the terms of the saving clause in the British capture warranty. The loss is "other-

wise covered by this policy" because it is insured against elsewhere within it, that is, in the war-risk rider. Since the Portmar had not been "condemned" when she was damaged by "implements of war" the saving clause thus reinstates, in this case, coverage avoided by the free of British capture warranty, still assuming, of course, that the policy was in force at the time of the loss."

In regard to the "loss otherwise" clause in the policy, Scott contended that the "savings clause" (loss otherwise clause) excluded loss to the PORTMAR while under Allied restraint.[1] This contention was rebuffed by this Court's statement urged in Petitioner Felicione's brief in the case sub judice that "the terms of the savings clause" did not state that the vessel was protected when under allied restraint. (B 11) The quotation in *Calmar*, supra, which, according to Petitioner Felicione, is supposed to conflict in some way with the decision in the case sub judice, states:

"The underwriters resort to a second argument concerning the saving clause. They contend, not quite consistently with the earlier argument, that the clause was meant to save losses which occur while a vessel is under certain Allied restraints, limited in number, but not under others. The underwriters, upon the trial, offered to prove as much by an expert witness. No more need be said than that to vary the terms of the saving clause so as to make it mean what the expert in the District Court said it meant—which on its face it cannot mean—would be to reform the contract, and that the requirements of the equitable doctrine of reformation are not met in this case."

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[1] " * * 'unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.' "

Reduced to its simplest terms, Scott claimed that the "savings clause" excluded loss of the PORTMAR when seized by a British Ally. **This Court refused to consider such a contention since the "savings clause" did not remotely contain such language. Such a contention was ludicrous. This Court then held that the policy afforded coverage when the PORTMAR was seized by a British Ally.[2] The second question was also resolved against Scott.[3]**

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[2] " * We thus read the provisions of this policy as insuring against a loss such as that of the Portmar, though it be the consequence of seizure by a British ally. So, reasoning substantially along these lines, did the District Court, and it proceeded to hold the underwriters liable. The Court of Appeals assumed that the 'labyrinth of verbiage, within which lurks whatever contract was made, is to be understood to agree that, although the ship might at the time be under the 'restraint of princes', the policy should cover her loss . . .' "

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[3] "But it held that 'the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it.' 197 F2d, at 796. The voyage had ended, the court said, because the dominion exercised over the Portmar by Allied authorities was complete, and was very probably intended to continue indefinitely. The policy, in turn, was no longer in force because it was written for a voyage and could not outlast it, any more than a voyage charter would. Precisely as frustration of the voyage would end the latter, so it releases an underwriter from further liability."

* * * * *

"But we are not required to accept the broad ground on which the District Court rested. It is not contended here that anything done by any officer or official on the scene or elsewhere before the Portmar was damaged made it explicit—and now objectively provable—that she would be detained indefinitely or even for such a period of time as might be thought to postpone her return voyage unreasonably. Such an explicit decision might at least more likely have come to the prompt attention of the owners, whereas in its absence, as here, no owner, whether on the scene or not, could so much as make an informed guess concerning the fate of the voyage. We do not decide that case, but we do hold that if a policy such as this is to provide any appreciable and safely predictable protection over and above that of a policy which does not insure at all against consequences of Allied detainments, coverage cannot be said to have ended before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage."

What the quotation urged by Petitioner in *Calmar* has to do with the decision in the case at bar is not discernible. It does not conflict with anything in the Circuit Court of Appeals decision here. Petitioner obviously contends that one cannot deny the plain meaning of an insurance clause in an insurance policy. But this has no bearing on this case since the Circuit Court of Appeals decision was solely based upon the clear legal meaning of the peril "assailing thieves".

The decision under review did not contain a reformation of contract by the Circuit Court of Appeals. The District Court held that under the facts of the case, Paprocki was an "assailing thief". The Circuit Court of Appeals held that the District Court was in error in determining what constituted the peril "assailing thieves".

Petitioner's brief is replete with recitals of what was or was not included in the trial briefs in the District Court. (B 8, 10, 11, 17) An examination of such briefs will readily reveal that *none* of the quoted authority upon which the Circuit Court of Appeals decision is based was brought to the attention of the District Court. Petitioner did not cite such cases in support of the question of "what was an assailing thief". Research was not concentrated in this area. When it was, the complete fallacy of the District Court's opinion was revealed.

Thus, the case at bar does not conflict with any past precedent; at the least, *Calmar*, supra. Instead it is consistent with judicial authority which begins in the 18th Century that an "assailing thief" is one who takes personal property from a vessel.

Petitioner is incorrect in contending that the Circuit Court of Appeals did not hold that the capture of the MISS SONDRA LEIGH constituted an "assailing

theft." (B 12) The Court held that the vessel was not lost because of actions under the peril "assailing thieves".

A second argument unconnected with the question of conflict is that a description of the property insured was wrongfully confined to the goods aboard a vessel. (B 12) Petitioner overlooks the fact that such a description contained the precise language "* * stores, boats and furniture." (B 7) Such a description is entirely consistent with the Circuit Court of Appeals' ruling.

POINT II

HAS PETITIONER BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN THE CASE AT BAR?

Petitioner's quest to find some basis for a second appellate review leads it to claim that the decision under review will affect maritime insurance on a national level. (B 15, 16) This contention is without merit. Petitioner admits that there is scant authority dealing with the subject. Such a fact in and of itself warrants the conclusion that this decision lacks any great importance to anyone except the litigants themselves. This Court in *Fields v. United States*, D.C. 1907, 205 U.S. 292, 27 S.Ct. 543, 51 L.Ed. 807, said:

> "* In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of grav-

ity and general importance. There is no conflict between the decisions of state and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

The Circuit Court of Appeals after exhaustive research pronounced this case to be "bizarre"[4] and concontaining a peril "infrequently defined".[5] There is no national question presented here but simply one of policy construction which follows age-old precedent. The decision of the Circuit Court of Appeals will not create chaos but will serve to properly and adequately inform those who have coverage under "assailing thieves" precisely what the coverage is meant to include.

For the first time, Petitioner claims a constitutional abridgement of its rights because it claims that the Circuit Court of Appeals took its property without due process of law in violation of the Fifth Amendment to the United States Constitution. (B 16-19) Nothing could be further from the truth. A Federal question cannot be raised for the first time in the Supreme Court, not having been litigated in the trial or lower appellate

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[4] See Appendix, Page 2.

[5] "We are convinced that the term 'assailing thieves' in marine policies provides for theft by force or violence of personal property on vessels, not coverage for the theft of the vessel itself. We have researched the subject exhaustively. All the authorities we found dealing with the term 'assailing thieves' arise in the context of taking of goods aboard a vessel: none construe the term with reference to a taking of the vessel itself. *See, e. g.*, Swift v. American Universal Ins. Co., 1965, 349 Mass. 637, 212 N.E.2d 448 and cases there cited; Babbitt, Goode & Co. v. Sun Mutual Insurance Company, 1871, 23 La.Ann. 314; Annot. 19 A.L.R. 3d 1150.
"The term 'assailing thieves' is of long standing, but has been infrequently defined. Its historical contour was succinctly developed in Swift v. American Universal Ins. Co., *supra*, * *."

tribunal. *Beck v. Washington*, D.C. 1962, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955, reh den 370 U.S. 965, 8 L.Ed 2d 834, 82 S.Ct. 1575. In reality, the Circuit Court addressed itself to Petitioner's claim that coverage was afforded by collision or barratry. The Circuit Court specifically found such contentions frivilous and unsupported by the facts of the case:

> "Concluding, as we do, that the loss of the MISS SONDRA LEIGH was not covered by a peril contemplated by either party or insured against in the marine policy issued by Citizens Casualty to Filicione, the judgment of the District Court is reversed and the cause is rendered." (A 11) (Opinion at 140)
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> "2. As we pointed out, we have declined to consider the arguments of Felicione made for the first time on appeal that the loss was a 'like peril to that of assailing thieves,' or was a like peril to that of 'barratry' or was a 'collision.' Only to prevent a miscarriage of justice must we give heed to such hopefully bolstering afterthoughts. *E.g.*, McCrea v. Harris County Houston Ship Channel Navigation District, 5 Cir. 1970, 423 F.2d 605, 610 n. 19; American Surety Co. of New York v. Coblentz, 5 Cir. 1967, 381 F.2d 185. This is plainly not such a case and deserves but scant passing remarks. No one until now ever remotely considered collision coverage and properly so, because the MISS SONDRA LEIGH was a total loss *before* the vessel was rammed. The claim of barratry is frivilous because Paprocki was neither master nor mariner of the MISS SONDRA LEIGH. Moreover, the general words 'all other like perils' cannot extend the scope of the policy to include perils beyond and entirely different from those specially enumerated. Feinberg v. Insurance Company of North America, 1 Cir. 1958, 260 F.2d 523, 527." (A 11) (Opinion at 140)

The decision under review held that Petitioner's argument concerning other areas of coverage should not be considered; *but even if the Court did consider such contentions, these contentions were completely without merit*. Petitioner cannot deny the precise clear English language contained in Footnote 2 quoted above. (Opinion at Page 140) (A-11)

There could be no coverage under the collision peril because the MISS SONDRA LEIGH was a constructive total loss *before* Captain Paprocki rammed her.

Barratry could not be claimed because Paprocki was not a master or mariner of the MISS SONDRA LEIGH. Paprocki was captain of the ESTO FLEET. The "like peril" clause which would be similar to "assailing thieves" would not under the definition of theft of personal property give petitioner any assistance in its quest for coverage.

The Circuit Court of Appeals simply held in unmistakable language that it did not have to consider petitioner's alternative claim for coverage and, if considered, such alternatives were legally unsound. This is not violative of the Fifth Amendment to the United States Constitution.

Due process of law simply means notice of the action brought and an opportunity to defend. *Nat. Bank v. Luckett*, Ky. 1944, 64 S.Ct. 599, 321 U.S. 223, 88 L.Ed. 692, 151 A.L.R. 824; *Baiard v. Hunter*, Ark. 1907, 27 S.Ct. 261, 204 U.S. 241, 51 L.Ed. 461. The enactment of the judicial process through law, in its regular course of administrative justice is "due process". C.A. Ohio 1956, 233 F.2d 220. Cert. Den. 77 S.Ct. 94, 352 U.S. 870, 1 L.Ed.2d 76. Without question, Petitioner was accorded such administrative justice.

It is remarkable that not one case from this Court or any other appellate tribunal is cited in support of Petitioner's claim that it was denied due process. Such claim stands naked and exposed as an unrealistic and unfounded attempt to raise a constitutional question in order to obtain a second appeal or review of the district court's decision by this Court. In this posture there are no grounds for granting certiorari.

POINT III

WAS THERE COVERAGE UNDER RESPONDENT'S MARINE INSURANCE POLICY FOR THE CONSTRUCTIVE TOTAL LOSS OF THE MISS SONDRA LEIGH?

(A) ASSAILING THIEVES

The Circuit Court of Appeals held that it was "convinced that the term 'assailing thieves' in maritime policies provides coverage for theft by force or violence of personal property on vessels, not coverage for the theft of the vessel itself."[6-7] The Court cited exhaustive authority in support of this conclusion. Petitioner has cited *none*.[8] (B 12-15)

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[6] (A 7) (Opinion at 139).

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[7] (A 10) (Opinion at 140).

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[8] Petitioner's comment in Footnote 4, Page 12 of its Brief to the effect that *Naylor v. Palmer* (1854) 10 Exch. 382; 2 C.L.R. 1202; 23 L.J.Ex. 323; 24 L.T.O.S. 83; 18 Jur. 961; 2 W.R. 621; 156 E.R. 492, Exch. Aff. S.Ct. sub nom — Naylor v. Palmer (1853) 8 Exch. 739, stands for the proposition that seizure of the vessel "was one of theft or analogous to it under the doctrine of ejusdem jenehis" is incorrect.

While on route to Callao, Peru, plaintiff Naylor's vessel was taken over by Chinese coolies who were being shipped to Peru as slaves. The coolies seized the boat and murdered the captain, re-

sulting in the complete loss of the boat. The perils of "piracy, rovers, and thieves" were covered by the policy. From a verdict for Naylor, Palmer appealed, claiming that the acts of the coolies which were the proximate cause of the loss, were not piracy. Defendant Palmer contended that the acts of the coolies were motivated by a desire not to proceed on the voyage and to avoid slavery. In overruling this contention, Colridge J. stated:

> "*The admitted seizure of the vessel by them, the taking her out of the possession and control of the master and crew, and the diverting her from the voyage insured, were either direct acts of piracy or acts so entirely ejusdem generis, that, if not reducible to the special words of the policy,* they are clearly included within the general words at the end of the peril clause.
>
> "The question then arises on the pleas, and the principle that the proximate cause was to be looked to was admitted, indeed insisted on, equally by both sides on the argument. The decision of the case therefore depends simply on a question of fact, what occasioned the loss? and this will be answered by determining another, when did the loss occur? If no loss occurred until after the Coolies had restored to the mate and crew the possession and control of the vessel, she being at that time in a fit condition to prosecute the original voyage and carry them to their destination, then their not being so carried to it may be referable solely and proximately to their unwillingness to be so carried. *But if the loss was complete as soon as they had murdered the captain and forcibly taken possession of the vessel,* and for a time put an end to the voyage, then the loss is referable proximately to that unlawful act of theirs, and the motive which induced them to commit it; their unwillingness, namely, to be carried to their original destination is immaterial to be considered, because remotely only the cause of what occurred.
>
> "We think the latter is clearly the true view of the case, and that nothing can make it more clear than the simple statement. Nothing was then wanting to make the loss complete. A change of circumstances might have reduced [390] it; this, however, never occurred, and therefore may be dismissed from consideration." (Emphasis supplied)

The history of the development of the maritime meaning of thieves and assailing thieves goes back to the 18th century. It originated with the provisions covering early 18th Century vessels for loss of goods, stores, or tackle on board the vessel. In other words, personal property on board the vessel. It has never been applied to theft of the entire vessel. A special coverage or peril "theft of the entire ship" has been used to cover such an event. Petitioner's policy does not have such a clause in the case at bar.

Unassailable proof that such a construction has been placed upon the clause "thieves" and "assailing thieves" is easily furnished.

In Arnold Eleventh Edition, the subjects pirates and thieves are treated separately, and are stated as constituting separate perils. (See Section 836, supra, this Brief, Page 23). Section 837, Page 1088 of Arnold deals with the definition of thieves:

> "837. Secondly, as to thieves, it is provided by the Rules for Construction of Policy *(t)* that the term 'does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.'
>
> "The theft that is insured against in the policy means that which is accompanied by violence *(latrocinium)*, and not simple theft *(furtum)*; it being an old and elementary rule of the law of insurance that *furtum non est casus fortuitus*, is not one of the fortuitous events against which the owner may seek indemnity by insurance, but one which the law presumes the master might have prevented by the exercise of due vigilance, and the loss arising from which he consequently ought to bear *(u)*."

In Winter Marine Insurance, 3rd Ed., Page 87, theft of goods on board ship is discussed:

"Standards. Even the seemingly prudent course may result in establishing commercial standards through competitive price cutting that approach a situation which is against public policy. For instance, many years ago no underwriter ever considered insuring against petty thievery, now commonly known as *theft and pilferage*. The underwriter was willing to protect a merchant against assailing thieves, against whose activities he was powerless to protect himself. However, by proper packing, the merchant could largely eliminate the hazard of petty thievery. Some underwriters, eager for premium, offered to assume the hazard of pilferage. Some merchants accepted the offer, and the problem developed. If the premium charged was less than the extra cost of good packing, the imprudent merchant paid the premium and shipped his goods in inferior packages. Goods that arrive at destination in imperfect condition do not cultivate good relations, and if many shipments so arrive, a merchant may lose his markets to those merchants of his own or other countries who seek to carry out their commercial obligations on a high level of business conduct. Any system relieving a merchant or a shipowner of any obligations that he should assume tends to break down those standards of commercial practice the observance of which creates international commercial good will."

Further, at Page 184 of Winter:

"Thieves. The peril of *thieves*, as covered by the marine-insurance policy, is generally recognized by merchants and by the textbook writers as that of the taking of property by force, as distinguished from taking by stealth, which latter form of larceny is known by the specific term *pilferage*. *It was always the intention of underwriters to protect property on vessels from losses occasioned by*

the criminal acts of those who obtained access to the property by force. Pilferage, however, was not contemplated by the underwriter when property was insured, because such loss was supposed to be the result of the criminal acts of those who had a right to be with the property, such as stevedores or others who by stealth mingled with them and thus had access to the goods. Unfortunately, this theory and practice were overridden in certain state courts, where the judges, in an academic discussion of the meaning of the word 'thieves' ignored for the most part the practice of merchants and underwriters which, of old, was the basis on which marine-insurance law was determined and held that the word 'thieves' covered what is commonly known in marine circles as pilferage. Accordingly, most policies in use in the United States have inserted the words 'assailing thieves' in order to make clear the original and present intention of underwriters insuring against thieves. No such interpretation has been given to the word 'thieves' in the English courts, but in the Marine Insurance Act, Par. 9 of the rules for construction reads: 'The term "thieves" does not cover clandestine theft or a theft committed by any one of the ship's company, whether crew or passengers.' Such clandestine theft, under the term *pilferage*, is now commonly included in marine policies. The results of including this hazard in the years immediately following the two world wars were very disasterous to underwriters. The granting of pilferage insurance meets a need of the merchant but is unsound in principle in that it creates a tendency to lessen the care of the shipowner for property in his custody. It also has a tendency to make the merchant less careful in packing his goods for shipment."

Winter thus recognizes that the original clause "thieves" in maritime policies was meant to cover "property on vessels." American policies added the

word "assailing" to "thieves' to exclude pilferage or the taking of property on ship by the crew. In *Swift v. American Universal Insurance Company* (Mass. 1965) 212 N.E. 2d 448, plaintiff's yacht was tied up at a pier in Neponset. When the crew went ashore, someone smashed in a plywood "patch" covering a window which was undergoing repair. They entered the cabin and stole personal property valued at $3,600.00. Plaintiff's policy covered loss by "assailing thieves" and "theft of the entire yacht." The court held that the loss was covered by assailing thieves and said:

> "* * * *Specifically, it argues that it has not been shown to have been caused by 'assailing thieves'.* It appears that, in times long past, marine insurance policies covered losses at the hands of 'Pirates, Rovers (and) Thieves.' Beawes, Lex Mercatoria Rediviva, 245 (1754). Jacob, Law-Dictionary, Vol. II, Insurance, I, 1 (1797). *The word 'thieves' in marine insurance was held to apply to persons, not connected with the insured vessel, who committed thefts by force or violence* in Marshall v. Nashville Marine & Fire Ins. Co., 20 Tenn. 99, 101 (1839). At approximately the same time, however, in New York, the meaning of 'thieves' in marine insurance was held to include secret and nonviolent larceny even though committed by persons employed or working on the vessel. * * *" (Emphasis supplied)

In an annotation "Risks Covered by Marine Insurance Policy Against Theft" 19 A.L.R. 3rd 1150:

> "Applicable provisions of marine policies may state the coverage in terms of losses due to either 'thieves,' 'assailing thieves,' *'theft of the entire ship,'* or general 'and all other like perils.' Before the last-mentioned clause may have applicability to thefts, of course, there must be a specific enumeration of some form of theft coverage preceding such clause.

> "Protection against 'thieves' was apparently intended by early marine insurers to cover only thefts accompanied by violence, as opposed to secret thefts, such as might be suggested by the different connotations of 'robbery' and mere 'stealing.' To avoid the construction placed upon the word 'thieves' by some courts that it included secret thefts without violence, the word 'assailing' was added to 'thieves' by the insurers, to include coverage only where the taking is accomplished by violence, either by forceful entry or forceful taking." (Emphasis supplied)

In the following cases, goods or property were stolen and held to be covered within a policy insuring against "thieves." *Atlantic Ins. Co. v. Storrow* (1835 N.Y.) 5 Paige 285; *American Ins. Co. v. Bryan and Maitland* (1841 N.Y.) 1 Hill 25, Affd. 26 Wend. 563; *Spinetti v. Atlas S. S. Co.* (1880) 80 N.Y. 71; *Bridge v. Niagara Ins. Co.* (1829) 1 N.Y. Supr. Ct. (1 Hall 423) 467; *Marshal v. Nashville N. & F. Ins. Co.* (1839) 20 Tenn. (1 Humph.) 99.

The insurance of the MISS SONDRA LEIGH covered equipment, stores, boats and furniture. These were covered by "assailing thieves." If the vessel was covered for theft as the District Court held, what is the meaning of the exclusion of capture, seizure, and piracy? Why would such exclusions be written into the policy? The answer must be that they were meant to cover specific perils which have specific maritime meaning and significance. Captain Paprocki did not intend to *steal* the vessel when he shot Tindall and the Mexican national. His sole purpose was murder. If his motive was theft, he would have kept the boat. Instead when Grisham first saw the ship it had already been scuttled.

In *Feinberg v. Insurance Company of North America* (5th Cir. 1958) 260 F.2d 523 (reversing case at 161 F.Supp. 686) the yacht MARIPOSA was scuttled when the boat was moved from its moorings in the Neponset River in Dorchester to another dock ninety feet away. A small drain plug was unscrewed under the cabin. Personal property such as a T.V., fishing tackle, etc., was taken. The MARIPOSA was insured against "assailing thieves" and "theft of the entire yacht." The District Court held that there was no coverage and found for the insurer, North America. The Fifth Circuit reversed holding that the policy covered the loss as being a "theft of the entire yacht." This Fifth Circuit further held that the loss (scuttling) could not have been covered by the "assailing thieves" peril in the policy.

The author's comment in 19 A.L.R. 3rd 1150 at 1152 supports this interpretation:

> "Thus, loss of personal property taken from a yacht which had been moved 90 feet to another dock and thereafter scuttled, was said by the court in Feinberg v. Insurance Co. of North America (1958, DC Mass) 161 F Supp 686, vacated on other grounds 260 F2d 523, not to be within the coverage of a marine insurance policy providing *against loss from assailing thieves.* Although the plaintiff, suing on the policy, did not contend that the loss was occasioned by such assailing thieves, *the court briefly mentioned in passing that such contention could not be made.*" (Emphasis supplied)

(B) CAPTURE OR SEIZURE

So that this Court can satisfy itself, if it desires, that the loss of the MISS SONDRA LEIGH was excluded, it is clear that the loss of the MISS SONDRA LEIGH was excluded by the capture or seizure war-

ranties in the policy. If the vessel was lost due to capture or seizure, of course there would be no coverage.

The facts in this case show that Captain Paprocki captured the MISS SONDRA LEIGH. Paprocki either killed or drove off the vessel's entire crew. When Duhon jumped overboard, Paprocki obtained entire control of the vessel. The specific warranty against capture or any taking of the vessel stated:

> "Notwithstanding anything to the contrary contained in this policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; * *" (Lines 151-154 of policy)

This clause first specifies that notwithstanding anything in the policy loss by capture, seizure, restraint or the *consequences* thereof or any attempt or any taking of the vessel is excluded. This clause excludes the loss of the MISS SONDRA LEIGH on its face. A case essentially in point is *Kleinwort v. Shepard* (1859) 1E&E 447; 28 L.J.Q.B. 147; 32 L.T.O.S. 313; 5 Jur.N.S. 863; 7W.R. 227; 120E.R. 977. Here action was brought for the entire loss of the "Henriette Marie." A declaration in the policy declared the ship to be "warranted free from capture and seizure, and the consequences of any attempt, threat, upon any kind of goods etc. and upon the body, tackle." This clause was essentially identical to the exclusion in Petitioners policy in the case at bar.

The "Henriette Marie" sailed from Macao with her destination as Havana, Cuba. On board were 350 Chinese emigrants. While on the high seas the emigrants

assaulted and *killed* the captain and crew and took the ship. The issue before the Court of Exchequer was whether coverage was afforded the owners of the vessel or whether coverage was excluded as coming within the provision or warranty against capture. The appellate court found for the insurer and stated:

> "* * * The loss disclosed would clearly come within the general enumeration of perils which, according to the policy, the assurers were contented to bear and took upon themselves. But the defense rests on the previous words, warranted free from capture and seizure, and the consequences of any attempt thereat.' The contention on the part of the defendant is that this is a loss by seizure within the meaning of the warranty.
>
> "That the loss as alleged in the declaration, is a loss by seizure, according to the common meaning of that word in the English language, can admit of no doubt. Dr. Johnson defines 'seizure' to be '*the act of taking forcible possession.*' The declaration alleges that, while the ship was proceeding on the voyage insured, and while she was on the high seas, the Chinese emigrants 'piratically and feloniously assaulted the captain of the ship and divers of the crew, and piratically and feloniously by force took, stole and carried away the ship, and the [454] provisions and stores then being on board of her, from the custody and possession of the captain and crew, whereby and by reason of which piracy and theft" a total loss accrued to the assured. We cannot suppose from this warranty, as was suggested, that the Coolies merely diverted the ship from the due course of her voyage, making a temporary use of her, that they might escape from bondage. It thus becomes necessary for the plaintiffs to shew that the word 'seizure' is used in the warranty in some peculiar and limited sense.
>
> • • •

"We believe that a warranty in this form is sometimes introduced into policies, when there is an apprehension of war, with a view to protect the underwriter from belligerent risks, and to make him contented with a peace premium. But, where it is introduced, there is no decision that it must be confined to belligerent seizure; and we clearly think that it would extend to a *capture or seizure by pirates.*

"Then, argued Mr. Wilde, it must, at all events, be confined to a seizure by violence from without, excluding any thing to be done by those who were lawfully on board the ship. But what reason is there for such a restriction, in the absence of any allegation upon the record of any peculiar mercantile usage of the expression, and in the absence of any judicial decision imposing this restricted meaning upon it? *If the crew, intending to turn pirates, were to murder the captain and to run* [455] *away with the ship, would not this be a loss by seizure?* The Coolies were passengers, no doubt; but suppose that, during the voyage of an emigrant ship, the emigrants, intending to turn pirates, should murder the captain and the crew, and run away with the ship, would this not be a loss by seizure? *We think that it would.* The conjectural motives which may have influenced the parties to the policy cannot influence us. (Emphasis Supplied)

• • •

"However this may be, we must form our opinion of the intention of the contracting parties from the plain meaning of the language they have employed; and therefore give judgment for the defendant."

This case demonstrates error in the case sub judice. Capture or seizure is the act of forcibly taking possession of the ship. Lord Campbell flatly stated that the killing of the captain was was a seizure by *pirates*. The only

difference in *Kleinwort* and the case at bar is that the Chinese emigrants were original passengers on board the ship and Captain Paprocki was a passenger who boarded after the ship was on the high seas. This distinction is obviously immaterial.

In Arnold on Marine Insurance, Eleventh Edition, Section 829, Page 1067, it is stated:

> "829. Capture, properly so called, is a taking by the enemy as prize *(f)*, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken *(g)*. "Capture" by itself probably means belligerent capture only *(h)*. Seizure, however, includes other seizures, such as one by revenue or sanitary officers of a foreign state *(i)*.
>
> "The arrest, or carrying in for adjudication, of neutral ships by belligerent cruisers, *though not properly called capture in cases where there is no intent to deprive the owner of his property in the ship*, yet falls within the meaning of the words 'takings at sea' as one of the perils insured against; and the loss thence arising would be recoverable under a count alleging loss by capture. (Emphasis Supplied)
>
> • • •
>
> "As we shall see more at large hereafter in treating of abandonment, *capture is prima facie a case of total loss*, which gives the assured an immediate right to give notice of abandonment." (Emphasis Supplied)

The District Judge held that when Captain Paprocki lashed the dead bodies to the boat and cast the boat away, towing her in such a manner to sink her and finally ramming her "acted with force against the in-

sured property with the intent to permanently dispossess the owner of the property so as to "become an 'assailing thief.'" Yet all case law holds that depriving the owner of a vessel is a capture or seizure. What the District Judge failed to recognise is that an "assailing thief" is one who steals *personal property* on the boat and not the entire vessel itself. *At the moment Captain Paprocki chased Duhon overboard, he had completed a capture or seizure of the boat.* At the time of the capture, the owners suffered a total loss of the boat and its capture was the proximate cause of the loss. The loss occurred at this point, not when the boat was overturned and rammed as held by the District Judge.

Defendant's argument is further supported by the statements found in 45 C.J.S. Insurance, Section 863, Page 939:

> § 863. Capture, Seizure, and Takings at Sea. Capture, seizure, takings at sea, and war risks are perils insured against under the terms of various policies.
>
> "The risk of capture and seizure may be insured against, or the policy may expressly cover war risks, or, as is more customary, the policy may except such risks from the coverage assumed, as shown infra § 876. *Capture includes all hostile takings made with intent to deprive the owner or made for the purpose of putting the property taken to a specific use for the benefit of the captor.* It is a capture whether the taking is lawful or *unlawful*, by *friends* or allies, enemy or belligerent, or by *pirates*.
>
> "*Seizure.* Seizure imports the taking possession of a ship or vessel by superior force, or by violence from without, such as the taking of a ship by the act of governments or other public authority for a

violation of the laws of trade, or some rule or regulation instituted as a matter of municipal policy, or in consequence of an existing state of war, and whether or not by lawful authority; but it does not extend to a barratrous conversion by the officers and crew, or either of them. (Emphasis Supplied)

Finally, in *Dole v. New England Mutual Marine Insurance Company* (1863) 88 Mass. 373, the ship "Golden Rocket" was seized, looted and burned by the armed steamer "Sumpter" under the flag of the Confederate States of America. A total loss was claimed by the owner of the "Golden Rocket". The policy was warranted against capture or seizure:

"The policies on which the plaintiffs seek to recover contain the usual clause descriptive of the risks which the insurers are contented to bear, as follows: 'the sea, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes or people, of what nation or quality soever, barratry of the master, (unless the insured be owner of the vessel,) and of the mariners, and all other losses and misfortunes which have or shall come to the damage of the said vessel or any part thereof.' In the margin of one of the policies there is a printed stipulation of this tenor, viz: 'Warranted free from capture, seizure or detention, or the consequences of any attempt thereat; the clause herein embodied touching said perils or adventures to the contrary notwithstanding.' In the other policy a similar warranty is thus expressed: 'Warranted by the assured free from loss or expense arising from capture, seizure, detention, or the consequences of any attempt thereat, any stipulations in the policy to the contrary notwithstanding.' The purpose of inserting this warranty is manifest. It is designed to exempt the insurer from certain risks which are enumerated in the general clause above cited, and in legal effect strikes them from the con-

tract. Of these excepted risks for which the insurer is not to be liable, the first named is a loss of the vessel by capture. It is contended on the part of the defendants that the facts proved at the trial bring these cases within the fair meaning of the warranty, and that the plaintiffs are not entitled to recover on the policies, whether the ship was taken by persons who may be properly designated as pirates or not, or whether their acts were lawful or unlawful, *because the loss was caused by acts which constituted a capture*, in the sense in which that word is used in the contract." (Emphasis supplied)

In holding that the word "capture" covered *all* unlawful takings of vessels by force, the Court said:

"On turning to elementary treatises on the subject of insurance, it will be found that the most approved of the text writers do not restrict the meaning of the word 'capture' so as to limit its signification to the taking of ships or vessels by belligerents engaged in lawful war, nor to their forcible seizure by the acts of governments; but that it is also used by them to signify *any unlawful taking by force, by whomsoever the act is accomplished*, and that it includes a piratical taking as well as those made *jure belli*. Thus in Marshall on Insurance, (4th edit. by Sergeant Shee,) 394, we find this definition: 'Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it.' He adds: 'Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war; and unlawful, when it is against the rules established by the law of nations. But in general, for every loss occasioned by capture, whether lawful or unlawful, the insurer is liable, the words of the policy being sufficiently comprehensive to include, *and a warranty 'free from capture or seizure' to exclude, every species of capture to which ships at sea can ever be exposed.*' So

in 2 Arnould on Ins. 808, it is said: 'Capture is deemed lawful when made by a declared enemy, lawfully commissioned, and according to the laws of war; unlawful when it is made otherwise. But its legality or illegality does not affect the liability of the underwriter as against the assured; whether lawful or unlawful, or however made, capture, when the proximate cause of loss, renders the underwriter liable under a policy alleging the loss to be by capture. (Emphasis supplied)

• • •

"In Phil. Ins. § 1110, it is stated that 'the word 'capture' is of itself broad enough to comprehend any forcible seizure, arrest or detention which may be lawfully insured against.' So Chancellor Kent says: 'Every species of capture, whether lawful or unlawful, is also a loss within the policy.' 3 Kent Com. (6th ed.) 304. Benecke, 348, in speaking of the causes of abandonment, enumerates capture and detention as being among the leading ones, and adds: 'Capture by an enemy or pirate is *prima facie* a total loss." It will also be found that the word 'capture' when not used with reference to the contract of insurance, is applied by legal writers of authority to the taking of vessels by pirates. Abbott on Shipping, (7th ed.) 27. 1 Kent Com. (6th ed.) 108. 2 Wooddes. Lect. 422, (Lect. xxxiv.) And such is the meaning attributed to it in the *St.* of U.S. of 1819, c. 77, §§ 2, 3, 4, enacted for the punishment of piracy. 3 U.S. Sts. at Large, 513.

• • •

"We have extended these citations to an unusual length, in order to make it apparent that in legal nomenclature there is no such limitation on the meaning of the word "capture" as that which must be given to it in order to charge the underwriters on these policies. It is true that there is no direct decision that a taking by pirates is a capture. Nor is there any to the contrary. Probably the precise

> question has never before arisen. But we think it cannot be doubted that such an application of the word is not inapt or unusual, but is in conformity to long established and well considered legal phraseology."

The above authority is explicit that the peril "capture" is broadly defined in marine insurance to cover *all* takings of ships under *all* conditions. If this were not enough, the broad language contained in the warranty excluding capture in the case at bar is sufficient to encompass Captain Paprocki's seizure and ultimate destruction of the MISS SONDRA LEIGH. Paprocki was a pirate who captured the MISS SONDRA LEIGH. It is insignificant what his later actions were after he took command of the vessel.

CONCLUSION

Petitioner seeks to invoke the jurisdiction of this Court by creating a claim of conflict with *Calmar v. Scott*, supra, decided by this Court, which is entirely remote in its application to the case sub judice. This contention is spiced by a claim of national calamity and denial of due process which in its claim demands swift reversal of the Circuit Court of Appeals' opinion under review.

The issues raised are analogous to the claim of Red China in the early and mid-1960's that the United States was a "paper tiger". This accusation of course meant that while the United States frequently showed its military claws, it, in reality, lacked military substance and capability and could be easily defeated. Petitioner's case here is like the proverbial Chinese "paper tiger" who proclaims conflict, denial of due process and catastrophic national maritime ramifications from the decision under review when in reality its position completely lacks legal substance. Accordingly, the Petition for Writ of Certiorari should be DENIED.

Respectfully submitted,

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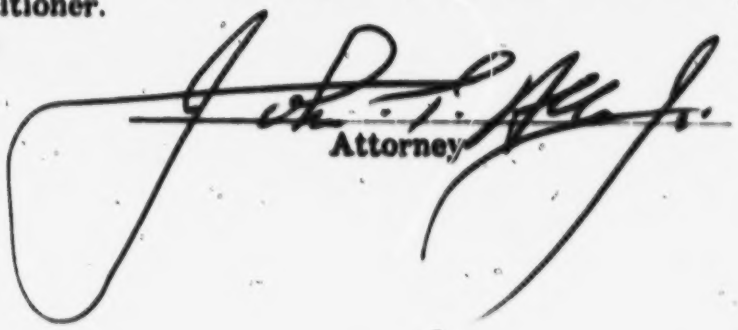
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on the 25th day of January, 1971,, two copies of the foregoing Brief were furnished by mail to Chester H. Ferguson and Charles F. Clark of Macfarlane, Ferguson, Allison & Kelly, P. O. Box 1531, Tampa, Florida 33601, Counsel for Petitioner.



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